# In the Supreme Court of the United States

OCTOBER TERM, 1952

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No. 122

JACOB COLON, ET AL., PETITIONERS

*v.*

FEDERAL TRADE COMMISSION

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

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## BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

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### OPINION BELOW

The opinion of the United States Court of Appeals for the Second Circuit (R. 59) is reported in 193 F. 2d 179.

### JURISDICTION

The judgment of the court of appeals was entered on February 9, 1952, and an order entered on April 26, 1952, by a Justice of this Court extended the time for filing a petition for a writ of certiorari to June 13, 1952 (R. 65-67). The petition for a writ

of certiorari was filed on June 11, 1952. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTIONS PRESENTED

1. Whether petitioners' methods of doing business come within the prohibitions of Section 5 of the Federal Trade Commission Act.

2. Whether the Commission's findings have adequate support in the evidence.

3. Whether the Commission's order is so indefinite as to be violative of petitioners' constitutional rights.

STATUTE INVOLVED

Section 5 of the Federal Trade Commission Act, 38 Stat. 717, as amended by the Act of March 21, 1938, 52 Stat. 111, 15 U.S.C. 45, provides in part as follows:

> (a) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.
>
> The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

STATEMENT

The Federal Trade Commission, after determining that petitioners were violating Section 5 of the Federal Trade Commission Act, entered a cease and desist order which the court of appeals affirmed

in a one-sentence per curiam opinion. The principal facts found by the Commission are as follows:

Petitioners are engaged in selling a variety of household novelties and toilet articles, and they effect sales through representatives who adopt a selling device presented to them in petitioners' advertising circulars. The circulars describe and picture the articles which petitioners offer for sale. A portion of each circular lists 24 items of merchandise and their prices. A device commonly called a "pull card" is printed adjacent to this list. The card contains 24 tabs, and when a tab is pulled the name and price of a particular article are disclosed. The sales representatives induce prospective purchasers to pull the tabs and to pay the price (ranging from 9¢ to 48¢) disclosed by the pulled tab. When all the tabs have been pulled, the representative remits to petitioners the total amount collected ($10.18), and they send him the merchandise designated on the card.[1] The representative is then in a position to give the merchandise to the various purchasers. Goods sold through the medium of this pull card device are sold and distributed by means of a game of chance, gift enterprise or lottery scheme. (R. 3a-5a, 7a.)

On the basis of the foregoing facts, the Commission concluded that petitioners were engaging in unfair acts and practices in interstate commerce

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[1] Representatives who sell all items included in the pull card are entitled to receive either a cash premium or one of the merchandise premiums described in petitioners' advertising circulars (R. 4a-5a).

within the meaning of Section 5 of the Federal Trade Commission Act (R. 8a).

ARGUMENT

The court below affirmed the Commission's order on the authority of *Wolf* v. *Federal Trade Commission,* 135 F. 2d 564 (C.A. 7), which involved practices identical with those in the present case. This was likewise true in *Cinader* v. *Federal Trade Commission,* 141 F. 2d 1022 (C.A. 2), where the Commission's order was affirmed per curiam.[2]

*Federal Trade Commission* v. *Keppel & Bro., Inc.,* 291 U.S. 304, held that it is "unfair," within the purview of Section 5 of the Federal Trade Commission Act, to use a selling scheme under which the purchaser's payment or the return which he receives depends upon chance. The doctrine of this case has been applied by the various courts of appeals in a variety of factual situations.[3] Moreover, under the selling scheme used by the present petitioners, chance determines what the purchaser receives to an even greater degree than in *Keppel.* It is clear, therefore, that petitioners' contention that their practices do not come within the prohibitions of the Act is without merit.

Petitioners cite (Pet. 5) *United States* v. *Halseth,* 342 U.S. 277, as establishing that their activities are not a violation of Section 213 of the Crim-

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[2] The present petitioners' counsel was also counsel for the petitioners in the *Wolf* and *Cinader* cases.

[3] The Government's brief in opposition in *Lichtenstein* v. *Federal Trade Commission,* No. 83, this Term, cites or refers to many of these decisions.

inal Code, 18 U.S.C. 336. But petitioners' non-violation of this section is immaterial. This Court in the *Keppel* case ruled that sale of merchandise by offering it to the public on a gambling basis is "unfair" within the meaning of the statute, irrespective of whether the conduct comes within "criminal statutes imposing penalties on gambling, lotteries and the like." 291 U.S. at p. 313.

Petitioners question (Pet. 2) whether the Commission's findings have adequate evidentiary support and contend (Pet. 7) that the court below did not give the evidence the review required by the Administrative Procedure Act. Petitioners have not attempted to substantiate these contentions and they plainly present no issue meriting review by this Court.

Petitioners also contend (Pet. 7-8) that the Commission's order is objectionably vague and general. The order is identical with that approved in the *Wolf* case, where the opinion dealt carefully with numerous contentions but treated the alleged indefiniteness of the order as deserving only summary rejection. 135 F. 2d 564, 568. The substance of the order is the same as in hundreds of orders in lottery cases, some 50 of which have been reviewed and affirmed by the courts. See cases cited in brief in oppositoin in No. 83, n. 1, p. 6; n. 2, p. 9.

## CONCLUSION

The decision below is clearly correct and there is no conflict of decisions. It is therefore respectfully

submitted that the petition for a writ of certiorari should be denied.

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JULY 1952.

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# DENIED